

TITLE 2, SECTIONS 7291.2 – 7291.17
SEX DISCRIMINATION: PREGNANCY, CHILDBIRTH OR RELATED
MEDICAL CONDITIONS

Notice published March 2, 2012

NOTICE OF PROPOSED RULEMAKING

The California Fair Employment and Housing Commission (“Commission”) proposes to amend existing sections 7291.2 – 7291.16, “Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions,” to sections 7291.2 – 7291.17, after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARINGS

The Commission will hold two public hearings:

- In **Los Angeles**, starting at **10 a.m. on Tuesday, April 17, 2012**, at the Ronald Reagan State Office Building Auditorium, 300 South Spring Street, ground floor, Los Angeles, California. The Auditorium is wheelchair accessible.
- In **San Francisco**, starting at **10 a.m. on Thursday, April 19, 2012**, at the Hiram Johnson State Building Auditorium at 455 Golden Gate Avenue, basement level, San Francisco, California. The Auditorium is wheelchair accessible.

At each hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Commission requests, but does not require, that persons who make oral comments at the hearing also submit a written copy and an electronic copy in Word of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Commission. The written comment period closes at **5 p.m. on April 19, 2012**. The Commission will consider only comments received at the Commission offices, delivered in person to Commission personnel at either public hearing referenced above, or through Commission email by that time. **The Commission’s preference is to receive comments electronically, in Word, via the email address given below. The Commission appreciates suggested alternate language to the current proposed revisions in comments it receives.**

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or

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AUTHORITY AND REFERENCE

Government Code section 12935, subdivision (a), authorizes the Commission to amend the proposed regulations, which would implement, interpret, or make specific sections 12926, 12940, 12943 and 12945 of the Government Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Commission proposes to amend existing sections 7291.2—7291.16 in Title 2 of the California Code of Regulations (CCR) regarding Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions to sections 7291.2—7291.17.

The purpose of the proposed amended regulations is to update the Commission’s regulations on pregnancy to conform to statutory changes to the Fair Employment and Housing Act. These proposed regulations are responsive to legislative revisions passed.

- In 1999, [A.B. 1670](#)¹ amended Government Code section 12945, to require employers to reasonably accommodate female employees affected by pregnancy, childbirth or related medical conditions. (Former Gov. Code § 12945, subd. (c)(1), now at Gov. Code § 12945, subd. (a)(3)(A).) Pre-[A.B. 1670](#), Government Code section 12945 had required employers to provide transfers to less strenuous or hazardous positions and to provide pregnancy disability leaves of up to four months, but lesser reasonable accommodations were not required. [A.B. 1670](#) required that other reasonable accommodations, such as more frequent rest breaks, allowing snacking to avoid nausea or providing a stool were also required. The [A.B. 1670](#) amendment was characterized as minor by the author and by all legislative bill analysts, with no fiscal impact to employers.² As detailed below and in the Commission’s Fiscal Impact Statement (Form 399), the Commission estimated that an employer would spend an average of \$527 per pregnant employee for her to attend 9-12 prenatal visits during her pregnancy.
- In 2004, [A.B. 2870](#)³ amended Government Code section 12945 to eliminate distinctions between employers with 15 or more employees covered by Title VII

¹ **Exhibit 1:** Stats. 1999, c. 591 ([A.B. 1670](#), § 9).

² See:

- **Exhibit 2:** [Assembly Committee on the Judiciary, May 11, 1999 hearing, A.B. 1670 analysis prepared by Drew Liebert, Assembly Judiciary Committee;](#)
- **Exhibit 3:** [Assembly Committee on Appropriations, May 26, 1999 hearing, A.B. 1670 analysis prepared by Chuck Nicol, Appropriations;](#)
- **Exhibit 4:** [Senate Judiciary Committee, August 17, 1999 hearing, A.B. 1670 analysis prepared by “DLM”;](#) and
- **Exhibit 5:** [Senate Appropriations Committee, August 30, 1999 hearing, A.B. 1670 analysis prepared by Lisa Matocq.](#)

³ **Exhibit 6:** Stats. 2004, c. 647 ([A.B. 2870](#), § 5).

of the Civil Rights Act of 1964 (Pub. L. 88-352) (42 U.S.C. § 2000e, et seq.) and employers with 5 to 14 employees, covered only by the Fair Employment and Housing Act (FEHA)(Gov. Code § 12900, et seq.).

Previously, Government Code section 12945 had provided three exceptions for “small employers” with 5-14 employees: 1) for “normal” pregnancies, small employers needed to provide only six weeks of pregnancy disability leave; 2) small employers did not have to provide health care coverage for pregnancy regardless of whether they provided coverage for other temporary disabilities; and 3) small employers did not need to select a pregnant employee for a training program if the training program could not be completed more than three months before the woman’s expected departure date for her pregnancy disability leave.

[A.B. 2870](#) eliminated these three exceptions and these regulations reflect those changes. The [A.B. 2870](#) amendment was also characterized as minor by the author and by all bill analysts, with no fiscal impact to employers.⁴

- In 2011, [S.B. 299](#)⁵ passed and, as of January 1, 2012, requires employers to maintain group health plan coverage for employees taking pregnancy disability leave. Previously employers were required in providing group health care benefits to pregnant employees to be consistent with coverage for other temporary disabilities (if the employer provided a continuation of coverage for other temporary disability leaves, then it needed also to continue health coverage for employees taking pregnancy disability leave). If an employer did not provide for continuation of health care coverage for medical leaves, however, it was not required to do so for employees taking pregnancy disability leave.

[S.B. 299](#) explicitly requires employers to continue group health plan coverage regardless of their policies regarding such coverage for other temporary disabilities. These revised regulations reflect the change in the law.

The Commission has determined that the number of small businesses affected by S.B. 299 is limited in several ways. [S.B. 299](#) affects only those small businesses that provide health care benefits to its employees, and impacts those only for the short duration of pregnancy disability leave. Most pregnant employees want to work as much as possible, and only one in three takes leave prior to delivery. Post-delivery, the California Family Rights Act ([CFRA](#)), Government Code

⁴ See:

Exhibit 7: [Assembly Committee on Labor and Employment, April 21, 2004 hearing, A.B. 2870 analysis prepared by Ben Ebbink, Labor & Employment Committee;](#)

Exhibit 8: [Assembly Committee on Appropriations, May 5, 2004, A.B. 2870 analysis prepared by Stephen Shea, Appropriations;](#) and

Exhibit 9: [Senate Committee on Labor and Industrial Relations, June 23, 2004 hearing, A.B. 2870 analysis prepared by Frances Low.](#)

⁵ **Exhibit 10:** Stats. 2011, c. 510 ([S.B. 299](#), § 1.5).

sections 12945.1 and 12945.2, already requires small businesses with 50 or more employees to pay the health care premium during bonding or medical leave.⁶

- In 2011, [A.B. 592](#)⁷ passed and, as of January 1, 2012, made it an unlawful practice for an employer to interfere with an employee's rights to be reasonably accommodated, transfer or take pregnancy disability leave because of pregnancy. The author and all analysts of this bill have stated that [A.B. 592](#) codified existing law,⁸ notwithstanding one unpublished court of appeal decision which had questioned whether there was a cause of action for interfering with an employee's right to take pregnancy disability leave.⁹ Thus, this 2011 legislation did not add any adverse impact on small businesses or create any additional costs to employers of any size.

These proposed amended regulations also provide more clarity and guidance to employers and employees regarding preventing discrimination based on pregnancy, childbirth or related medical conditions and reasonable accommodation, transfer and disability leave for woman affected by pregnancy, childbirth or related medical conditions, as mandated by Government Code sections 12940, 12943 and 12945. To the extent consistent with the FEHA, these regulations provide interpretations of terms and provisions of law consistent with other federal and state laws, such as the Americans with Disabilities Amendments Act of 2008 ([ADAAA](#))¹⁰ and to the EEOC's recently revised [ADAAA interpretative regulations](#)¹¹; the California Family Rights Act ([CFRA](#)),¹² and

⁶ The Commission adopted these proposed amended pregnancy regulations on November 1, 2011, after the two 2011 bills referenced above had been signed into law but before they were to take effect on January 1, 2012: **Exhibit 10**—Stats. 2011, c. 510 ([S.B. 299](#)) § 1.5 [group health plan coverage] and **Exhibit 11**—Stats. 2011, c. 678 ([A.B. 592](#)), § 1.5 [interference with a woman's pregnancy rights to reasonable accommodation, transfer and pregnancy disability leave]. The Commission intends to incorporate any changes necessitated by these bills into subsequent amendments to these regulations after considering public comments it receives on these issues.

Other non-pregnancy related FEHA 2011 legislation (**Exhibit 12**—Stats. 2011, c. 261 ([S.B. 559](#)), covering genetic information, affected the numbering of FEHA's definitional section 12926 subsection numbers.

For ease of reference, the proposed amended pregnancy regulations, this Notice of Proposed Rulemaking and the Commission's Initial Statement of Reasons reference the now current, 2012 Government Code subsection numbers listed in section 12926, rather than the subsection numbers in effect when the Commission adopted these regulations in 2011.

⁷ **Exhibit 11**: Stats. 2011, c. 678 ([A.B. 592](#), § 1.5).

⁸ **Exhibit 11**: *Id.* at § 3.

⁹ *Harris v. CashCall, Inc.* (2011) 2011 WL 1085116, at * 4.

¹⁰ PL 110-325 (S. 3406), 42 U.S.C. § 12101, et seq.

¹¹ 29 C.F.R. § 1630, et seq., eff. May 24, 2011.

¹² Gov. Code § 12945.1 & 12945.2.

[CFRA interpretative regulations](#),¹³ and the Family and Medical Leave Act ([FMLA](#))¹⁴ and its [FMLA interpretative regulations](#).¹⁵

BENEFITS OF PROPOSED REGULATIONS

The Commission has determined specific benefits anticipated by the proposed adoption of these regulations, including nonmonetary benefits preventing discrimination against employees or applicants on the basis of pregnancy, childbirth or related medical conditions. Those benefits are discussed below, following an analysis by the Commission of alternatives to these regulations.

EVALUATION OF WHETHER THESE REGULATIONS ARE INCONSISTENT OR INCOMPATIBLE WITH EXISTING STATE REGULATIONS

As required by Government Code section 11346.5, subdivision (a)(3)(D), the Commission has made an evaluation of whether the proposed pregnancy regulations are inconsistent or incompatible with existing state regulations. That analysis is given below, following the Commission's analysis of benefits of these proposed pregnancy regulations.

Relevant sections of the Fair Employment and Housing Act interpreted by these regulations include:

Government Code section 12935, subdivision (a), authorizes the Commission to adopt regulations to implement, interpret and make specific these requirements.

Government Code section 12926, subdivision (n), provides in relevant part that protection against sex discrimination includes protection against the perception that someone possesses a characteristic of sex, including that the individual is pregnant or has a related medical condition.

Government Code section 12926, subdivision (o), provides a definition of reasonable accommodation.

Government Code section 12926, subdivision (q), provides in relevant part that the definition of "sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

¹³ California Code of Regulations, title 2, § 7297.0, et seq.

¹⁴ Pub. Law 103-3; 29 U.S.C. § 2601 et seq.

¹⁵ 29 C.F.R. Part 825.

Government Code section 12940, subdivision (a), prohibits, in relevant part, sex discrimination in hiring, employing, training, firing, or in terms or conditions of employment.

Government Code section 12940, subdivision (b), prohibits, in relevant part, labor organizations from discriminating on the basis of sex in union membership, which would include discrimination on the basis of pregnancy, childbirth or related medical conditions.

Government Code section 12940, subdivision (c), prohibits, in relevant part, sex discrimination in the selection or training of an individual in any apprenticeship training program or other program leading to employment, which would include discrimination on the basis of pregnancy, childbirth or related medical conditions.

Government Code section 12940, subdivision (d), prohibits, in relevant part, sex discrimination in the advertising of jobs or in any other way in the employment process, which would include discrimination on the basis of pregnancy, childbirth or related medical conditions.

Government Code section 12940, subdivision (h), prohibits, in relevant part, retaliation for opposing sex discrimination, which would include opposing discrimination on the basis of pregnancy, childbirth or related medical conditions.

Government Code section 12940, subdivision (i), makes unlawful, in relevant part, aiding, abetting, inciting, compelling, or coercing the doing of any of the acts forbidden by the FEHA, or to attempt to do so.

Government Code section 12940, subdivision (j), forbids, in relevant part, harassment on the basis of sex, including harassment on the basis of pregnancy, childbirth or related medical conditions.

Government Code section 12940, subdivision (k), makes it an unlawful employment practice for employers, labor organizations, employment agencies, apprenticeship training programs, or any training program leading to employment to fail to take all reasonable steps to prevent discrimination and harassment from occurring, including discrimination on the basis of pregnancy, childbirth or related medical conditions.

Government Code section 12943 prohibits school districts from discriminating against employees on the basis of pregnancy in hiring, training program selection, firing, or in terms, conditions or privileges of employment.

Government Code section 12945, subdivision (a), provides that in addition to the provisions governing pregnancy, childbirth or related medical conditions in sections 12926 and 12940, it is an unlawful employment practice unless based on a bona fide occupational qualification to do any of the actions listed in the various subdivisions of 12945, subdivision (a).

Government Code section 12945, subdivision (a)(1), provides that it is an unlawful employment practice for an employer to refuse to allow a female employee disabled by pregnancy, childbirth or related medical conditions to take a pregnancy disability leave of up to four months, for the period of time that the employee is disabled, and thereafter return to work. An employer may require an employee who plans to take a leave to give the employer reasonable notice of the beginning and duration of the leave.

Government Code section 12945, subdivision (a)(2)(A), provides that it is an unlawful employment practice for an employer who provides its employees with group health plan coverage, as defined in Internal Revenue Code section 5000(b)(1), to fail to maintain those health benefits for an employee taking a pregnancy disability leave.

Government Code section 12945, subdivision (a)(2)(B), provides that if the employee is a state agency, the collective bargaining agreement governs the continued receipt by an eligible female employee of health care coverage.

Government Code section 12945, subdivision (a)(3)(A), provides that it is an unlawful employment practice for an employer to fail to reasonably accommodate an employee for conditions related to pregnancy, childbirth or related medical conditions, if she so requests, with the advice of her health care provider.

Government Code section 12945, subdivision (a)(3)(B), provides that it is an unlawful employment practice for an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

Government Code section 12945, subdivision (a)(3)(C), provides that it is an unlawful employment practice for an employer to refuse to transfer temporarily a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated. The employer is not required to create additional employment that the employer would not have otherwise created, to discharge another employee, to transfer another employee with more seniority, or promote any employee who is not qualified to perform the job.

Government Code section 12945, subdivision (a)(4), provides that it is an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under section 12945 (reasonable accommodation, transfer or pregnancy disability leave).

Government Code section 12945, subdivision (b), states that section 12945 is not to be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth or medical conditions related to pregnancy or childbirth under any other provisions of the FEHA, including section 12940, subdivision (a).

As amended, the Commission's regulations on pregnancy, childbirth or related medical conditions provide the following:

Section 7291.2, subdivision (a), defines terms used in Government Code sections 12926, 12940, 12943 and 12945 and these regulations, including, inter alia: "affected by pregnancy," "because of pregnancy," "CFRA," "covered entity," "eligible female employee," a woman "disabled by pregnancy," "employer," "employment in the same position," "employment in a comparable position," "FMLA," "four months," "group health plan," "health care provider," "intermittent leave," "medical certification," "perceived pregnancy," "pregnancy disability leave," "reasonable accommodation," "reduced work schedule," "related medical condition," and "transfer."

Section 7291.3 provides that it is an unlawful employment practice for an employer to harass an employee or applicant because of pregnancy or perceived pregnancy.

Section 7291.4 provides that there is no eligibility requirement before an employee affected or disabled by pregnancy is eligible for reasonable accommodation, transfer or disability leave. This provides guidance for employers and distinguishes rights to take pregnancy disability leave from California Family Rights Act ([CFRA](#)) leave, Government Code section 12945.2, subdivision (a), where there are eligibility requirements.

Section 7291.5 provides that unless a permissible defense applies, discrimination because of pregnancy or perceived pregnancy by any covered entity other than employers constitutes discrimination because of sex under the Fair Employment and Housing Act.

Section 7291.6, subdivision (a)(1), sets forth responsibilities of employers prohibiting discrimination because of pregnancy or perceived pregnancy in

- (A) hiring;
- (B) training programs selection;
- (C) promotion;
- (D) firing;
- (E) employment terms;
- (F) harassment;
- (G) retaliation;
- (H) involuntary transfer; or
- (I) other discrimination on the basis of sex.

Section 7291.6, subdivision (a)(2), sets forth responsibilities for any employer, because of the pregnancy of an employee, delineating that it is an unlawful employment practice to refuse:

- (A) to provide employee benefits for temporary disabilities;
- (B) to maintain and pay for group health plan coverage during an employee's pregnancy disability leave;
- (C) to provide reasonable accommodation for an employee affected by pregnancy;
- (D) to transfer the employee affected by pregnancy;
- (E) to grant the employee disabled by pregnancy a pregnancy disability leave; or
- (F) to interfere with any of the employee's rights provided at Government Code section 12945.

Section 7291.6, subdivision (b), discusses permissible defenses.

Section 7291.7 provides for reasonable accommodation for employees affected by pregnancy, childbirth or related medical conditions. The Commission considered but ultimately rejected the alternative of including an "undue hardship" defense because it is not explicitly provided for in Government Code section 12945, there is no legislative history supporting its inclusion, and reasonable accommodation for pregnant employees is usually minor and of limited duration.

Section 7291.8 provides for transfer for employees affected by pregnancy.

Section 7291.9 provides for pregnancy disability leave for employees disabled by pregnancy.

Section 7291.10 provides for reinstatement from pregnancy disability leave.

Section 7291.11 provides for terms of pregnancy disability leave.

Section 7291.12 covers the relationship between pregnancy disability leave and the federal Family and Medical Leave Act ([FMLA](#)), Pub. Law 103-3; 29 U.S.C. § 2601 et seq..

Section 7291.13 covers the relationship between pregnancy disability leave and the California Family Rights Act ([CFRA](#)), Government Code sections 12945.1 and 12945.2.

Section 7291.14 discusses the relationship between pregnancy disability leave and leave of absence as a reasonable accommodation for physical or mental disability.

Section 7291.15 covers remedies for violating Government Code sections 12940, 12943 and 12945.

Section 7291.16 provides the requirements for employers to give notice to their employees of their rights and obligations for reasonable accommodation, transfer and pregnancy disability leave.

Section 7291.17 provides for employee requests for reasonable accommodation, transfer or pregnancy disability leave, advance notice, medical certification and employer response to these requests.

DISCLOSURES REGARDING THE PROPOSED ACTION

(All exhibits referenced in this document are available on the Commission's website at www.fehc.ca.gov.)

The Commission has made the following initial determinations:

Legislative history for both 1999 legislation, [A.B. 1670](#),¹⁶ and 2004 legislation, [A.B. 2870](#),¹⁷ amending provisions covering pregnancy discrimination, indicate that the Legislature did not believe that either legislation had any fiscal impact for employers. See [Assembly Committee on Appropriations, May 26, 1999 hearing, A.B. 1670 analysis prepared by Chuck Nicol, Appropriations](#),¹⁸ and the [Senate Appropriations Committee, August 30, 1999 hearing, A.B. 1670 analysis prepared by Lisa Matocq](#).¹⁹ Neither of these analyses noted any costs attributable to employers for the portion of the legislation amending FEHA's pregnancy provisions. Similarly, the [Assembly Committee on Appropriations, May 5, 2004, A.B. 2870 analysis prepared by Stephen Shea, Appropriations](#)²⁰ did not note any costs attributable to employers. In its Form 399, Fiscal Impact Statement, the Commission estimated that the average cost to an employee accommodating an employee's average of 9-12 prenatal visits would cost employers \$527 per employee.

The Commission's preliminary analysis of 2011 legislation, [S.B. 299](#),²¹ mandating the continuation of group health plan coverage for employees taking pregnancy disability leave will have minor impacts on both small and large employers. The number of small businesses affected by S.B. 299 is limited in several ways. S.B. 299 affects only those small businesses that provide health care benefits to its employees, and impacts those only for the short duration of pregnancy disability leave. Most pregnant employees want to work as much as possible, and only one in three takes leave prior to delivery.²² Post-delivery, the California Family Rights Act already requires businesses with 50 or more employees to pay the health care premium during bonding or medical leave.

¹⁶ **Exhibit 1:** Stats. 1999, c. 591 ([A.B. 1670](#), § 9).

¹⁷ **Exhibit 6:** Stats. 2004, c. 647 ([A.B. 2870](#), § 5).

¹⁸ **Exhibit 3.**

¹⁹ **Exhibit 4.**

²⁰ **Exhibit 8.**

²¹ **Exhibit 10:** Stats. 2011, c.510 ([S.B. 299](#)), § 1.5.

²² **Exhibit 13:** University of California Newsroom article, April 4, 2006: [Few Women Take Pregnancy Leave in California, Study Finds](#).

Other 2011 legislation, [A.B. 592](#),²³ making an unlawful practice the interference with an employee's rights to be reasonably accommodated, to transfer to less strenuous or hazardous positions or to take pregnancy disability leave, codified existing law.²⁴ Thus, this 2011 legislation did not add any adverse impact on small businesses or create any additional costs to employers of any size.

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on a representative private person or businesses: The Commission estimates that the total statewide costs that businesses may incur to comply with these amended regulations over a three year period would be **\$10,897,306**. The proposed regulations clarify sections 12926, 12940, 12943 and 12945 and impose no further costs. The Commission arrived at this figure with the following calculations, assumptions and estimates:

According to labor data obtained from the Employment Development Department, there are approximately 4,357,182 women between the ages of 16 and 44 that are employed in California.²⁵ General fertility rates for this population are 65.5 per thousand.²⁶ Approximately 285,395 (4,357,182 x .0655) of these women are expected to become

²³ **Exhibit 11:** Stats. 2011, c. 678 ([A.B. 592](#), § 1.5).

²⁴ **Exhibit 11:** *Id.* at § 3.

²⁵ **Exhibit 14:** "Sex By Age By Employment Status for the Population 16 Years and Over," Universe: Population 16 years and older, Data Set Census 2000 Summary File 4 (SF 4) – Sample Data (2000) available at <http://www.calmis.ca.gov/FILE/Census2000/LFbySexbyAge.xls>. [This Excel table does not support a hyperlink. Cutting and pasting the url address above, however, will provide the Excel table with the cited data.]

²⁶ **Exhibit 15.** California Department of Public Health TABLE 2-2. [General Fertility Rates, Total Fertility Rates, and Brith Rates by Age and Race/Ethnic Group of Mother, California, 2005 - 2009](#).

pregnant in any given year with 52% of those women, or 148,405 (285,395 x 52%) continuing to work until they deliver.²⁷

Cost of average pregnancy reasonable accommodation: \$527

Department of Public Health statistics indicate that the average number of prenatal visits is 9-12 visits.²⁸ It is assumed that each prenatal care visit would require 1-2 hours of leave time from work, which would result in an impact of 24 hours per pregnant employee receiving prenatal care that an employer would have to cover for while the pregnant employee is absent or accept reduced productivity due to the absence. According to a National Institute of Health study,²⁹ 83.6% or 124,067 (148,405 x 83.6%) women in California receive prenatal care.

According to the latest EDD Quarterly Wage Information report,³⁰ the average monthly wage for females in California for the three quarters leading up to, and including, the third quarter of 2010 was \$3,510.75. Assuming this compensation rate, the average impact to employers for employees receiving prenatal care is approximately \$527 per pregnant employee. ($\$3,510.75 \div 4 \text{ weeks} \div 40 \text{ hours} \times 24 \text{ hours} = \526.61 , rounding up to \$527.)

A study conducted by University of California Berkeley researchers³¹ reveals that one in three California women take advantage of pregnancy benefits prior to delivery. (124,067 \div 3 = 41,356). The overall cost to California businesses to accommodate pregnant employees is estimated to be approximately \$21,794,612 annually. ($\$527 \times 41,356$.)

Assuming that approximately 50% of employers are already providing reasonable accommodations to pregnant employees and that half of the accommodations would

²⁷ **Exhibit 16:** Guendelman, Pearl, Graham, Angulo and Kharrazi, "Utilization of Pay-in Antenatal Leave Among Working Women in Southern California," *Maternal and Child Health Journal*, Vol. 10, No. 1, January 2006, p. 63, 66. [Abstract of Utilization of Pay-in Antenatal Leave Among Working Women in Southern California](#): full article unavailable online without paying subscription.

²⁸ **Exhibit 17:** California Department of Public Health, Table 2-9. [Number and Percent of Live Births by Number of Prenatal Visits and Race/Ethnic Group of Mother, California, 2006](#).

²⁹ **Exhibit 18:** Rittenhouse, Marchi, Braveman, "Improvements in Prenatal Care Utilization and Insurance Coverage in California: An Unsung Public Health Victory?" ABSTR ACAD HEALTH SERV RES HEALTH POLICY MEET. 2002; 19: 23. Family and Community Medicine & Institute for Health Policy Studies, University of California, San Francisco.

³⁰ **Exhibit 19:** LEHD State of California County Reports - Quarterly Workforce Indicators, Third Quarter, 2010, Age Group 14-99, Gender, Female, available at <http://www.labormarketinfo.edd.ca.gov/?pageid=127>. No more current data is available.

³¹ **Exhibit 13:** University of California Newsroom article, April 4, 2006: [Few Women Take Pregnancy Leave in California, Study Finds](#).

result in employers allowing flexible scheduling to accommodate the increased time off,³² the net impact to state employers would be approximately \$10,897,306 (1/2 of \$21,794,612). Spread across the approximately 384,398 businesses that employ 5 or more employees in California within child bearing age, this estimate would result in an impact of \$28.35 for each business. ($\$10,897,306 \div 384,398$.)

Legislative analysis of [A.B. 1670](#) (the bill requiring “employers to provide reasonable and measured accommodations to pregnant employees”) indicates that the Legislature “intended to permit employers to allow pregnant employees to remain in their current positions for longer time periods without the need for transfer, while assuring that less costly and disruptive steps (such as simply permitting more frequent restroom breaks or rest periods) are taken for pregnant employees who do not want or need to be transferred from their current positions.”³³ Therefore, the Legislature’s understanding was that the cost of most accommodations provided for by the statute would be de minimus.³⁴

The Legislature’s assumption that minor accommodations for employees affected by pregnancy or related medical conditions short of transfer or leave would be of no or little cost to employees is consistent with research conducted by the Department of Labor, Office of Disability Policy Job Accommodation Network (JAN) about the types of accommodations needed for a broad spectrum of disabled employees in the work place.³⁵ A JAN 2008-2009 survey of 559 employers found that 56% of all job accommodations for persons with disabilities resulted in no cost to the employer.³⁶

In general, pregnancy accommodation can be expected to be less costly than average disability accommodations because no special equipment is usually needed to accommodate a pregnant woman and the accommodation is needed for a short, finite period of time. The Commission’s proposed pregnancy regulations amendments follow legislative changes to permit employers to implement minor accommodations that are less costly than transferring an employee or requiring an employee to take a pregnancy disability leave: seven of the eight accommodations required by the proposed regulation will impose no additional cost on employers, as noted in the Commission’s Form 399, Fiscal Impact Statement.

³² **Exhibit 20:** Job Accommodation Network, [“Workplace Accommodations: Los Cost, High Impact”](#), p. 2, last updated September 1, 2011

³³ **Exhibit 2:** [Assembly Committee on the Judiciary, May 11, 1999 hearing, analysis prepared by Drew Liebert, Assembly Judiciary Committee](#), page 11.

³⁴ **Exhibit 2, *Ibid.***

³⁵ **Exhibit 20:** Source: Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” p. 3, last updated September 1, 2011 and *available at* <http://www.jan.wvu.edu/media/LowCostHighImpact.doc>.

³⁶ **Exhibit 20, *Id.*** at p. 4.

Initial cost for California employers to provide reasonable accommodations for 47,491 affected employees or \$0 - \$527 per employer. \$10,897,306

Cost over three years to provide reasonable accommodation \$10,897,306

The Commission estimated an initial cost for California employers by multiplying \$527 (the approximate cost for an individual employer whose employee takes 9-12 prenatal visits) by 41,356 (the number of women taking prenatal visits in any given year) to reach \$21,794,612 divided by two because the Commission assumed that half of California employers were already providing reasonable accommodations to employers and half of the accommodations would result in employers allowing flexible scheduling to accommodate the increased time off. The Commission assumed that a fertile employee would be pregnant once in three years, so that the cost over three years would not exceed the initial estimate.

The proposed regulations do not impose any additional costs beyond the statute.

Adoption of these regulations will not:

- (1) create or eliminate jobs within California.
- (2) create new businesses or eliminate existing businesses within California; or
- (3) affect the expansion of businesses currently doing business within California.

Significant effect on housing costs: None.

Small Business Determination

The Commission has determined that the proposed regulations will affect all businesses with five or more employees, including, potentially, 333,179 businesses with 5 to 50 employees.³⁷

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

To summarize, the Commission's economic impact assessment has determined that the average cost to an employer to comply with these regulations to be \$527, the initial and three year costs to 47,491 employers to comply with these regulations will be \$10,897,306. The benefits of these regulations, as set forth in detail below, will be increased clarity in the application of reasonable accommodation, transfer and pregnancy disability leaves; employment discrimination protections for applicants and employees

³⁷ **Exhibit 21:** Employment Development Department, Labor Market Information Division, Table 3A, Number of Businesses, Number of Employees, and Third Quarter Payroll by Size of Business, State of California, Third Quarter, 2 010 available at <http://www.calmis.ca.gov/file/indsize/2010sfcoru.xls> [to download Excel spreadsheet]. Businesses with 5 or more employees were added to reach 384,398. Of this total, 86.6% were employers with 5-50 employees. More current data is not available.

who are pregnant or perceived to be pregnant, and efficiency for businesses in planning and utilizing their resources as applicants and employees utilize pregnancy-related protections under the California Fair Employment and Housing Act.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Commission, for each revision, must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposal described in this Notice.

The Commission has discussed alternatives it considered, and why it chose the proposed revisions it selected, in its Initial Statement of Reasons.

The Commission invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

In considering alternatives, the Commission has opted to conform, wherever possible and consistent with legislative intent in the Fair Employment and Housing Act, with provisions covering comparable provisions in the California Family Rights Act ([CFRA](#)), Government Code sections 12945.1 and 12945.2 and the federal Family and Medical Rights Act ([FMLA](#)), Pub. Law 103-3; 29 U.S.C. § 2601 et seq.

BENEFITS OF PROPOSED REGULATIONS:

As required by Government Code section 11346.5, subdivision (a)(3)(C), the Commission has determined the following specific benefits from these proposed regulations, including nonmonetary benefits preventing discrimination on the basis of pregnancy, childbirth or related medical conditions:

1. Benefits to employers and employees interpreting [A.B. 1670](#), requiring employers to reasonably accommodate pregnant employees.

The Job Accommodation Network survey of employers who have provided reasonable accommodations to employees with disabilities lists a variety of benefits derived from the accommodations.³⁸ The benefits included retention of a valued employee, elimination of the costs associated with training a new employee, an increase in the accommodated

³⁸ **Exhibit 20.** Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” pp.3-5, last updated September 1, 2011 and *available at* <http://www.jan.wvu.edu/media/LowCostHighImpact.doc>.

employee's attendance, a savings in workers' compensation or other insurance costs, increased diversity of the company, improved interactions with co-workers, increased overall company productivity, improved interactions with customers, increased workplace safety, increased overall company attendance, increased profitability, and an increased customer base.³⁹

Perhaps the most striking benefits are the retention of valued employees and the elimination of costs associated with training a new employee. In a study of turnover costs in call centers, Hillmer, Hillmer, and McRoberts found that the vacancy of one employee costs "nearly as much as [the employee's] yearly salary."⁴⁰ This figure is echoed by the U.S. Chamber of Commerce's Institute for a Competitive Workforce, which reports that every worker who leaves her position costs her employer anywhere from \$3,000 to \$57,000, depending on the position.⁴¹ The U.S. Census Bureau reports that women, who are allowed to sit during the day, have easy access to rest facilities and more flexible schedules are generally able to work longer into pregnancy than other women.⁴² Therefore, accommodation of a pregnant employee which allows her to keep her job for the duration of her pregnancy (and after) will save businesses a great deal in turnover costs.

In addition to reduced turnover costs, accommodating pregnant employees will reduce pregnancy complications that could lead to high medical costs. The National Business Group on Health (NBGH) reports generally that good prenatal care and practices such as reducing stress and providing nutrition counseling for pregnant women save businesses money by reducing the risk of complications that result in decreased productivity and absenteeism.⁴³ The NBGH reports that "[t]he average cost to employers of lost productivity related to each premature birth is \$2,766 per employee."⁴⁴ Caring for pregnant women will also reduce medical costs for employers who provide health

³⁹ *Id.* at p. 5.

⁴⁰ **Exhibit 22.** Hillmer, Hillmer, and McRoberts, (2004) "The Real Costs of Turnover: Lessons from a Call Center," *Human Resource Planning*, Vol. 27 Issue 3, p. 34.

⁴¹ **Exhibit 23.** U.S. Chamber of Commerce, Institute for a Competitive Workforce, (2007) "Recruitment and Retention of the Frontline and Hourly Wage Worker: A Business Perspective." p. 2 *available at* <http://www.uschamber.com/sites/default/files/reports/frontlinehourlywagepaper.pdf> (last visited October 31, 2011).

⁴² **Exhibit 24.** U.S. Census Bureau, (2005) "Maternity Leave and Employment Patterns of First Time Mothers," p. 6, *available at* <http://www.census.gov/prod/2005pubs/p70-103.pdf> (last visited December 2, 2009).

⁴³ **Exhibit 25.** National Business Group on Health, "Healthy Pregnancy and Healthy Children: Opportunities and Challenges for Employers: The Business Case for Promoting Healthy Pregnancy," pp. 10-13 *available at* http://www.businessgrouphealth.org/healthtopics/maternalchild/investing/docs/4_businesscasepregnancy.pdf (last visited February 17, 2012).

⁴⁴ *Id.* at p. 11.

insurance.⁴⁵ For example, caesarian delivery is approximately \$3,000 more expensive than a vaginal birth, and a baby born at a low birth weight costs approximately \$150,000 more than a baby born at a normal birth weight.⁴⁶ Therefore, employers who provide health insurance will benefit from the required accommodations by lowering their health care costs.

While employers will greatly benefit from this regulation, pregnant employees will also greatly benefit. With minimal accommodations, the employee will be able to work longer, and therefore be better able to offset the costs of pregnancy and childbirth. In addition, the pregnant employee, retaining her job, will retain her medical benefits, and avoid medical complications to her pregnancy. This regulation recognizes that the well being of the pregnant employee and the well being of the employer are intertwined; the reasonable accommodation for pregnancy prevents harm to the employee while keeping the employer's costs low.

In addition to the benefits experienced by the pregnant employees and the employers, the State will benefit from this regulation. Should the failure of the State to accommodate a pregnant State employee result in the employee's loss of her job, the State would be required to pay unemployment insurance. The minimal accommodations provided for in the regulation may prevent an employee from losing her job and ending up taking unemployment insurance or welfare if she is unable to find other employment.

The total statewide benefits to these amendments are difficult to quantify precisely because of the breadth of the regulations' coverage, but the benefits will be felt by employers, employees, and the state. Employers will benefit through the elimination of the costs of training a new employee, lower medical costs if they provide insurance coverage, and increased employee morale. Employees will benefit through the ability to work longer into their pregnancy, thereby retaining a paycheck and benefits. The State will benefit because pregnant employees will not be forced to turn to the state for unemployment compensation or other medical benefits if the State is the employer.

2. Benefits to employers and employees interpreting [A.B. 2870](#), eliminating small employers exceptions for pregnancy.

These proposed regulations clarify existing law enacted by [A.B. 2870](#).

a. Clarification of Leave Requirements for Non-Title VII Employers: Proposed Amended § 7291.9.

The current regulation⁴⁷ is confusing to employers because it seemed to provide that non-Title VII employers were not required to give their pregnant employees the full four

⁴⁵ *Id.* at pp. 10-13.

⁴⁶ *Id.* at p. 4.

⁴⁷ Current Cal. Code Regs, tit. 2, §7291.11, subd. (b).

months of leave if the employee required it.⁴⁸ The Commission has always interpreted the current regulation in a manner that is consistent with the proposed change by providing that women who needed longer leave for health reasons received the longer leave.⁴⁹ Therefore, the proposed regulation clarifies existing law without imposing any new requirements on non-Title VII employers.

b. Removing the Exemption for Non-Title VII Employers to Cover Pregnancy Under Their Insurance Policies: Proposed Amended § 7291.6.

Removing this exemption brings the regulation into conformity with the statute and therefore protects the employer against litigation. Indeed, when the Legislature passed the amendment initially, it was apprised of the Commission's interpretation that failing to provide pregnancy benefits when health coverage is offered to male employees is sex discrimination in the terms and conditions of employment.⁵⁰

c. Ensuring that Employers Include Pregnant Employees in Trainings: Proposed Amended § 7291.6.

Requiring that employers include their pregnant employees in trainings will benefit employers by ensuring that all of their employees are fully trained, and will benefit the pregnant employees by ensuring that their decision to have a family does not unnecessarily put them at a disadvantage in their professional life.

The total statewide benefits of these amendments eliminating small employer exemptions are difficult to quantify precisely, but employers will benefit from the removal of inconsistencies in the regulatory and statutory schemes; clarity and consistency in the regulations and the statute may help employers avoid litigation. Moreover, employees will benefit by having the full leave, the job training, and the health coverage to which they are entitled under FEHA reflected in the regulations.

3. Benefits to employers and employees interpreting [S.B. 299](#), requiring employers to continue group health plan coverage to employees taking pregnancy disability leaves.

These proposed regulations clarify existing law enacted by [S.B. 299](#). Providing continuing health care benefits during pregnancy, and including during a pregnancy disability leave increases the likelihood of employees returning to full productivity following birth and reduces excess medical costs associated with pregnancy, postpartum and neonatal care. Health care benefits throughout pregnancy, childbirth and recovery

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ **Exhibit 7:** [Assembly Committee on Labor and Employment, April 21, 2004 hearing, A.B. 2870 analysis prepared by Ben Ebbink, Labor & Employment Committee](#), page 4.

from childbirth also can increase beneficiary utilization of preventative, prenatal and postpartum care, decreasing the chances for premature delivery, complications in childbirth and postnatal difficulties.⁵¹

4. Benefits to employers and employees interpreting [A.B. 592](#), making it an unlawful practice for an employer to interfere with an employee's rights to be reasonably accommodated, transfer or take pregnancy disability leave because of pregnancy.

This amendment provides the benefit of clarifying for employers and employees that employees who are denied the pregnancy-related benefits of reasonable accommodation, transfer to a less strenuous or hazardous condition or pregnancy disability leave will have a cause of action for interfering with an employee's right to take pregnancy disability leave. The author and all analysts of this bill have stated that [A.B. 592](#) codifies existing law.

EVALUATION OF WHETHER THESE REGULATIONS ARE INCONSISTENT OR INCOMPATIBLE WITH EXISTING STATE REGULATIONS

As required by Government Code section 11346.5, subdivision (a)(3)(D), the Commission has made an evaluation of whether the proposed pregnancy regulations are inconsistent or incompatible with existing state regulations covering sex discrimination and harassment (Cal. Code Regs., tit. 2, §§ 7287.6, 7288.0, 7290.6-7291.1) and to the regulations interpreting the California Family Rights Act (CFRA) (Gov. Code §§ 12945.1 & 12945.2) (Cal. Code Regs., tit. 2, § 7297.0, et seq.). As a result, the Commission:

- Included a definition and reference to CFRA at 7291.2(c) because eligible employees may use CFRA leave to bond with a newborn.
- Conformed its definition of a "health care provider" in both these pregnancy regulations (§ 7291.2(m)) and in its proposed, revised disability regulations (§ 7293.6(h)).
- Gave a definition of "Intermittent Leave," at § 7291.2(n) to be consistent as the term is used in the CFRA regulations at § 7297.3(c)(2) and (e)(1)-(e)(2).
- Conformed the definition of "reasonable accommodation" for pregnancy to that used in the FEHA for disability, at Government Code section 12926, subdivision (o), while at the same time distinguishing the pregnancy definition of "reasonable accommodation" not to include an assessment of undue hardship provided for disability reasonable accommodation at Government Code section 12926, subdivision (t), because of legislative intent in AB 1670 that pregnancy reasonable accommodations are de minimus.

⁵¹ **Exhibit 25.** National Business Group on Health, "Healthy Pregnancy and Healthy Children: Opportunities and Challenges for Employers: The Business Case for Promoting Healthy Pregnancy," pp. 10-13 *available at* http://www.businessgrouphealth.org/healthtopics/maternalchild/investing/docs/4_businesscasepregnancy.pdf (last visited February 17, 2012).

- Provided that FEHA's harassment provisions cover harassment on the basis of pregnancy (§ 7291.3).
- Distinguished that unlike CFRA, there are no eligibility requirements for an employee to take pregnancy disability leave (§ 7291.4).
- Made medical certifications discretionary (§ 7291.7(c)) for internal consistency with medical certification requirements for reasonable accommodation for a disability (proposed §7294.1(d)(5)) or to take a California Family Rights Act leave (Cal. Code Regs., tit. 2, § 7297.4(b)).
- Added the requirement that the employer affirmatively notify the employee of job openings at § 7291.10(c)(2)(A) to be consistent with a similar requirement under the proposed disability regulations (proposed § 7293.9(d)(4)).
- The Commission added a provision when an employee is laid off to track comparable language under the CFRA regulations at Cal. Code Regs., tit. 2, § 7297.2, subd. (c)(1)(A).
- Cross-referenced how pregnancy disability leave and CFRA leave interact. (§7291.13).
- Added a section distinguishing pregnancy disability leave from a reasonable accommodation leave for a disability (§ 7291.14).
- Added a provision stating that "direct notice" to the employer from the employee rather than from a third party regarding the employee's need for reasonable accommodation, transfer, or pregnancy disability leave is preferred (§ 7291.17(a)(7), but not required which conforms to comparable provisions in the disability regulations (proposed § 7294.1(d)(4)).

CONTACT PERSON

Inquiries concerning the proposed administrative action may be directed to:

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 San Francisco, CA 94102
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Please direct requests for copies of the proposed text (the "express terms") of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Ms. Noel at the above address.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Commission will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this

notice is published in the Notice Register, the rulemaking file consists of this Notice, the proposed text of the regulations, and the Initial Statement of Reasons. Copies may be obtained by contacting Ann M. Noel at the address or phone number listed above, or by downloading copies from the Commission's website at www.fehc.ca.gov.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearings and considering all timely and relevant comments received, the Commission may adopt the proposed regulations substantially as described in this Notice. If the Commission makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Commission adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Ann M. Noel at the address indicated above. The modified text will also be available on the Commission's website at www.fehc.ca.gov. The Commission will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Ms. Noel at the above address or on the Commission's website at www.fehc.ca.gov.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action including all exhibits, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our website at www.fehc.ca.gov.

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